RECORD
AND
BRIEFS

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No. 16-499

IN THE
Supreme Court of the United States

JOSEPH JESNER, ET AL.,

Petitioners,

v.

ARAB BANK, PLC,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF PROFESSORS OF INTERNATIONAL LAW, FOREIGN RELATIONS LAW, AND FEDERAL JURISDICTION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE* [1]

Amici curiae are professors who teach international law, foreign relations law, and/or federal jurisdiction at law schools, and have taught or written on the legal issues concerning the scope and application of the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350. *Amici* have a professional interest in the proper interpretation of the ATS, in view of its historical and legal context and the limited role of the federal courts in recognizing rights of action based on international law.

SUMMARY OF ARGUMENT

Congress enacted the ATS to accomplish a specific and limited purpose. As detailed in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the ATS was designed to address only private violations of the law of nations injuring aliens for which the United States had a duty to provide redress and which—if it defaulted on its duty—would constitute affronts to other nations that could result in diplomatic conflict or war. As this Court further recognized in *Sosa*, this 1789 provision was not intended to apply to other violations of the law of nations that did not implicate these concerns.

The claims that Petitioners, foreign nationals, assert here—an action against a private, multinational bank

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[1] Both Petitioners and Respondent have filed letters with the Clerk consenting to the submission of all *amicus* briefs. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae* or counsel made a monetary contribution to the preparation or submission of this brief.

headquartered in Jordan[2] for "financing and facilitating" attacks by terrorist organizations in Israel, the West Bank, and the Gaza Strip injuring them—involve no international obligation of the United States and thus implicate none of the purposes of the ATS. Petitioners do not allege a breach of any international duty owed by the United States, and indeed a principal thrust of their complaint is that Respondent has "violated national policies of the United States," First. Am. Comp. ¶24, J.A. 100—not that the U.S. has defaulted on its obligations.

The only connection Respondent has to the United States in this case is, as the court below noted, [its] alleged "clearing of dollar-denominated payments" related to the terrorist activities "through [its sole] branch in New York." *In re Arab Bank, PLC*, 808 F. 3d 144, 158 (2d Cir. 2015). The court of appeals affirmed dismissal of Petitioners' claims on the ground, in accord with circuit law, that the ATS does not provide for corporate liability. *Id.*[3]

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[2] Respondent is "the largest bank in Jordan with reported total assets of $23 billion. [It] is majority owned and controlled by the shareholders of the Arab Bank Group, a Jordanian holding company...." Together, they "own, control, and/or operate offices and branches worldwide, including branches in every Arab country and 15 branches that are located in Palestinian Authority-administered territories in the West Bank and Gaza...." First Am. Compl. ¶ 37, J.A. 167-68. "In addition to operating all over the Middle East, Arab Bank has operated a federally chartered bank in New York since 1983." Id. ¶44, J.A. 170. As of Q2, 2017, the Bank had $47.7 billion in assets. *See* www.arabbank.com/en/investfactsheet.aspx.

[3] Similar claims brought by U.S. nationals under the Antiterrorism Act ("ATA"), 18 U.S.C. § 2333, were severed from Petitioners' ATS case and tried to verdict. ATA claims can be asserted only by U.S. nationals. *See* 18 U.S.C. § 2333(a).

Amici submit that the judgment below can be affirmed on two distinct grounds, both going to whether Petitioners have stated a cause of action cognizable under ATS. The first ground is that since Petitioners do not claim a breach of a duty owed by the U.S. to a foreign state, they cannot proceed under the ATS's limited authorization of judicial recognition of an implied federal cause of action for certain international law violations. There is, in short, no "violation of the law of nations" within the meaning of the ATS if no duty of the United States to a foreign state is alleged to have been breached. The second ground is that Petitioners' complaint against a private corporation for international wrongdoing fails *Sosa*'s independent requirements of widespread acceptance and specificity "comparable to the features of the 18th century paradigms" recognized in that decision. 542 U.S. at 725; *id.* at 732.[4]

ARGUMENT

In *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), this Court provided two principles to guide whether U.S. courts should recognize pursuant to the ATS a federal common law tort action based on international law in addition to the "18th-century paradigms," *id.* at 725, specifically identified in Blackstone's *Commentaries* and likely to have informed passage of this statute—assaults on ambassadors, infringement of safe-conducts, and piracy.[5]

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[4] We do not address whether under *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013), Petitioners' claims survive the presumption against extraterritorial application.

[5] Acts of piracy would come within the scope of the ATS only if the United States had a duty to another state to provide

First, delineating a general approach, the *Sosa* Court emphasized that judicial recognition of an ATS-based cause of action—a form of judicial lawmaking which the Court likened to creating implied rights of action and other new bodies of federal common law—must be exercised, "if at all, with great caution." *Id.* at 728. Second, the Court articulated a specific principle ruling out claims for alleged violations "with less definite content and acceptance among civilized nations than the historical paradigms familiar" in 1789. *Id.* at 732.

Both of these principles require rejection, rather than recognition, of Petitioners' proposed implied cause of action in this case. First, the ATS was enacted to address a particular class of cases in which the United States was obligated to provide a remedy and failure to provide that remedy would be an affront to a foreign sovereign threatening relations with that sovereign. *See Sosa*, 542 U.S. at 715. Because Petitioners' ATS claims are not based on an alleged breach by the United States of its obligations to Jordan or any other foreign state, their claims are entirely unrelated to the interests and concerns the ATS was enacted to address. Absent such a breach, which Petitioners do not assert, this case does not involve a "violation of the law of nations" cognizable under this statute. Second, Petitioners' contention that the ATS impliedly authorizes corporate liability for international wrongs fails the "definite content and acceptance" requirements of *Sosa*.

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redress—for example, if the pirate was a U.S. national or if a non-U.S. national pirate sought refuge here.

I. CONGRESS ENACTED THE ATS TO ADDRESS TORT CLAIMS BY ALIENS, TYPICALLY ARISING WITHIN THE UNITED STATES, THAT THE UNITED STATES WAS OBLIGATED TO REDRESS AND WHICH, IF LEFT UNREDRESSED, MIGHT GIVE OTHER COUNTRIES "JUST CAUSE" FOR WAR

As *Sosa* recounts, Congress enacted the ATS as a means of accomplishing a specific practical goal: averting the "serious consequences in international affairs" that could ensue if the United States did not ensure that tortious wrongs against foreign subjects, typically occurring within the United States, were "adequately redressed." 542 U.S. at 715. The ATS was therefore aimed only at the "narrow set of violations of the law of nations," *id.*, that triggered such state-to-state concerns.

A. *Sosa* Left Open Whether and to What Extent the ATS Applies to Modern International Law Extending Beyond the State-to-State Concerns of 1789.

Although Petitioners and their *amici* frame the issue in this case as whether corporations are "immune" from otherwise-established liability under the ATS, the threshold question is, whether the ATS authorizes U.S. courts to recognize a cause of action for conduct not involving an alleged breach by the United States of a duty owed to another state. This Court has never decided that the ATS authorizes U.S. courts to create a cause of action for such claims. It has gone no further than to suggest in *Sosa* that it would not "close the door" to future recognition of a

yet-to-be-identified "narrow class of international norms." 542 U.S. at 729.

In particular, *Sosa* rejected the claim asserted in that case that Alvarez's arbitrary arrest and detention in Mexico by a Mexican national—authorized by a U.S. agency—violated the ATS. The Court held only that the international law grounds of liability he invoked failed to satisfy the requirements of "definite content and acceptance among civilized nations" comparable to "the historical paradigms familiar when § 1350 was enacted." 542 U.S. at 732.[6] It did *not* hold that satisfying the "definite content and acceptance" requirements would be sufficient to state a cognizable ATS claim. To the contrary, the Court expressly contemplated additional limits on the statute's reach: "This requirement of clear definition is *not meant to be the only principle* limiting the availability of relief in the federal courts for violations of customary international law, though it disposes of this action." 542 U.S. at 733 n.21 (emphasis added); *see also id.* at 732 ("Whatever the ultimate criteria for accepting a cause of action [under the ATS]. . . .").

Further, this Court emphasized, recognition of any new category of ATS claims beyond the three "historical paradigms" identified by Blackstone would be subject to a heavy burden of justification analogous to the constraints on recognizing implied

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[6] Having determined that the rule of conduct in question did not satisfy the requirements of definite content and uniform acceptance, the *Sosa* Court had no occasion to rule on whether the involvement of the U.S. law enforcement agency in obtaining the arrest and detention implicated an international duty of the United States reachable under the ATS.

rights of action or new federal common law. *See id.* at 725-28.

B. The ATS Was Designed to Address the Subset of Law of Nations Violations That "Threatened Serious Consequences" for the Diplomacy or Security of the United States.

As *Sosa* makes clear, the ATS was not designed to reach all violations of the law of nations that might be committed against an alien. It was only the "narrow set of violations . . . threatening serious consequences in international affairs, that was probably on the minds of the men who drafted the ATS." 542 U.S. at 715.

Under the prevailing understanding of the law of nations, the commission of the paradigmatic violations discussed in *Sosa*—such as offenses against ambassadors or infringement of safe conducts, *see* 542 U.S. at 715—was a diplomatic affront to the foreigner's sovereign that obligated the host nation as a whole to provide proper redress. The failure to provide such redress could result in diplomatic conflict or even "rise to an issue of war." *Id.*

For example, Blackstone emphasized that private infringements of safe-conducts were a cause of international conflict, writing that such offenses

> are breaches of the public faith, without the preservation of which there can be no intercourse or commerce between one nation and another: *and such offences may, according to the writers upon the law of nations, be a just ground of a national war. . . .*

4 William Blackstone, *Commentaries on the Laws of England* (J. Andrews ed. 1899), at *68 (emphasis added).

Likewise, Vattel, perhaps the Founders' leading authority on the law of nations, emphasized each nation's responsibility for redressing mistreatment of foreigners within that nation. Once a sovereign admits foreigners, Vattel wrote, "he engages to protect them as his own subjects, and to afford them perfect security, as far as depends on him." Emer de Vattel, *The Law of Nations*, bk. II, § 104, at 173 (J. Chitty ed. 1883) (1758)).

Importantly, this state responsibility included the after-the-fact obligation to provide a remedy against private subjects who committed such violations. "The sovereign who refuses to cause a reparation to be made for the damage caused by his subject, or to punish the offender, or, finally, to deliver him up, renders himself in some measure an accomplice in the injury, and becomes responsible for it." *Id.*, bk II, § 77 at 163. And the failure to satisfy this obligation could have severe consequences, including war, such that "the safety of the state, and that of human society, requires this attention from every sovereign"—that it not "suffer the citizens to do an injury to the subjects of another state. . . ." *Id.*, bk II, § 72 at 161.

In the United States, these responsibilities under the law of nations contributed powerfully to the perceived need for a stronger national government than existed under the Articles of Confederation, and, ultimately, to the enactment of the ATS. The period prior to the adoption of the Constitution saw repeated instances in which actions by American states or citizens violated law of nations rules, highlighting the flaws of

the existing system of government. *See* James Madison, *Vices of the Political System of the United States* (Apr. 1787), *reprinted in* 9 *The Papers of James Madison* 345, 349 (R.A. Rutland, et al, eds., 1975).

Recognizing the importance of remedying violations of safe conducts, the rights of ambassadors, and treaties—and its own impotence to provide the necessary remedies—the Continental Congress passed a resolution imploring the states to "provide expeditious, exemplary and adequate punishment" for "the violation of safe conducts or passports, . . . or hostility against such as are in amity . . . with the United States [a form of safe-conduct violation], . . . infractions of the immunities of ambassadors and other public ministers . . . [and] infractions of treaties and conventions to which the United States are a party." 21 *Journals of the Continental Congress* 1136–1137 (G. Hunt ed. 1912). This resolution, a precursor to the ATS, confirms that "a private remedy was thought necessary for diplomatic offenses under the law of nations," *Sosa*, 542 U.S. at 724.

The call for a stronger national government in the Constitution was in part a response to concern about such violations, and the potentially severe consequences of leaving them unredressed. James Madison questioned William Paterson at the Constitutional Convention as to whether the so-called New Jersey Plan for unicameral national governance would provide the means to prevent violations of the law of nations "which if not prevented must involve [the nation] in the calamities of foreign wars." 1 The Records of the Federal Convention of 1787, at 247 (M. Farrand ed. 1911). Madison further expounded that "[a] rupture with other powers is among the greatest of national calamities . . . [and so it] ought

therefore to be effectually provided that no part of the nation shall have it in its power to bring them on the whole." *Id.*

To similar effect, Edmund Randolph noted at the Convention that one of the principal defects of the Articles of Confederation was its inability to prevent infractions of the law of nations, raising the concern "that particular states might by their conduct provoke war without control." *Id.* at 27. And John Jay explained in *The Federalist* No. 3, at 20: "It is of high importance to the peace of America that she observe the laws of nations . . . , and to me it appears evident that this will be more perfectly and punctually done by one National Government than it could be either by thirteen separate States, or by three or four distinct confederacies."

In short, the Founders recognized that provoking foreign powers by failing to provide redress required by the law of nations posed real dangers to the young republic. They dealt with this problem through a number of mechanisms, both constitutional and statutory. In addition to the ATS, the Judiciary Act of 1789 addressed foreign relations concerns in several of its other provisions, including by giving this Court original jurisdiction (as envisioned in Article III) over cases by or against ambassadors and other public ministers; giving district courts original jurisdiction over admiralty and maritime cases; and giving circuit courts original jurisdiction over alien diversity cases in which the amount in controversy exceeded $500. Judiciary Act of 1789 §§ 13, 9, 11, 1 Stat at 78-80. The Crimes Act of 1790 subsequently made it a crime to violate "any safe-conduct or passport duly obtained and issued under the authority of the United States" or to "assault, strike,

wound, imprison, or in any other manner infract the law of nations, by offering violence to the person of an ambassador or other public minister." Crimes Act of 1790 § 28, 1 Stat. at 118. The same statute also outlawed piracy in § 8, *id.* at 113-114. See generally Thomas H. Lee, The Safe-Conduct Theory of the Alien Tort Statute, 106 Colum. L. Rev. 830 (2006).

This history fully confirms *Sosa*'s determination that the ATS reflects Congress' intensely practical purpose of remedying the subset of law of nations and treaty violations that "if not adequately redressed could rise to an issue of war." 542 U.S. at 715; *see also id.* at 724 (referring to the precursor 1781 resolution as addressing "diplomatic offenses under the law of nations"). The ATS, in addition to the 1789 Judiciary Act, the 1790 Crimes Act, and other measures, provided the remedy the United States was obligated to provide in such cases so as to satisfy the nation's international obligations and avoid diplomatic crisis or war.[7]

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[7] The 1795 opinion of Attorney General William Bradford with respect to potential claims against Americans who participated in the French plunder of a British slave colony in Sierra Leone, see 1 Op. Atty. Gen. 57, 57-59, which is discussed in both *Sosa* and *Kiobel*, provides a good example of the importance of there being an underlying duty of the United States to provide a remedy in delineating the scope of the ATS. Bradford does not explain why he believed the ATS was applicable. His view may well have been based on a violation of the 1783 treaty between the United States and Great Britain, which provided for the cessation of "all hostilities, both by sea and land" "between the subjects of the one and the citizens of the other." Definitive Treaty of Peace, U.S.-Gr. Brit., Art. VII, Sept. 3, 1783, 8 Stat. 80. If so, the case fell within the treaties clause rather than the law of nations clause of the ATS. In any event, as evidenced by the formal protests of British authorities, the alleged offense at

C. Since No International Duty of the United States is Involved in This Case, Respondent Has Not "Committed a Violation of the Law of Nations" Cognizable Under the ATS.

A cause of action under the ATS requires that the defendant has "committed a violation of the law of nations" (the treaty clause not being in issue). This statute does not make actionable all violations of customary international law committed by anyone and wherever they might occur, but only those violations that the United States owes an international obligation to prevent or remedy. *See* Part I, B *supra*.

Petitioners' claims in this case implicate no international obligation of the United States. The gravamen of their complaint is that Respondent has acted as "a conduit for terrorist financing," First Am. Comp. ¶100, J.A. 193, a "'paymaster,'" *id.* ¶18, J.A. 97, facilitating payments to terrorist organizations and families of terrorists responsible for death and injuries to Petitioners, all occurring in the Middle East. In acting in this manner, Respondent is alleged to have violated U.S. regulations and international standards for handling financial transactions the proceeds of which may end up in the hands of terrorist organizations or their agents or affiliates. Notably, there is no allegation that the United States has breached any international duty; indeed, a good portion of their Complaint is devoted to attempting to show Respondent has violated U.S. law. *See* First Am. Comp. ¶¶79-105, 244-246, J.A.183-195, 240-241.

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issue was one for which the United States as a nation was considered responsible.

If we return to the writings of Blackstone and Vattel, that were so influential to the drafters of the ATS in 1789, it is clear that the only violations of the law of nations that a nation had to redress were violations committed on its territory or by its citizens or nationals. As Blackstone notes, "where the individuals of any state violate this general law [of nations], it is then the interest as well as the duty of the government, *under which they live*, to animadvert upon them with becoming severity. . . ." Once the injured nation demand[s] satisfaction and justice to be done on the offender *by the state to which he belongs*," the offender's nation must provide redress or be deemed "an accomplice or abettor of his subject's crime. . . ." 4 Blackstone, *Commentaries* at *67-68 (emphasis added).

To similar effect are Vattel's teachings: "The sovereign who refuses to cause a reparation to be made for the damage *caused by his subject* . . . renders himself in some measure an accomplice in the injury, and becomes responsible for it." Vattel, bk II, § 77 at 163 (emphasis added). Every sovereign must ensure that it not "suffer [its] citizens to do an injury to the subjects of another state." *Id.*, bk II, § 72 at 161.

Since no breach of an international duty of the United States is involved, or has even been alleged, in this case, no violation of the law of nations within the meaning of the ATS has been committed, and therefore, Petitioners' complaint under the ATS should be dismissed.

D. In Any Event, Recognizing an ATS Claim Based on the Action or Inaction of a Foreign Sovereign Towards Its Own Citizens and Residents Outside the Territory of the United States Would Run Counter to, Rather Than Advance, the Purpose of the ATS.

Even if we put to one side the absence of an alleged breach by the United States of any international duty, it would run counter to the purposes of the ATS to recognize a claim under that statute where all of the relevant events occurred outside of the United States and the only foreign state conduct conceivably at issue is a possible failure of oversight of Respondent's banking activities in the Middle East by Jordan or other Arab countries where it engages in substantial business activity. Litigation against the foreign states themselves would, of course, be barred by sovereign immunity. Even though Petitioners' suit is ostensibly against Respondent only, a New York federal court provides an attractive vehicle for indirectly challenging the action or inaction of the states involved. However, neither the text nor any of the purposes of the ATS supports providing a forum for claims relating to a foreign government's action or inaction with respect to its own citizens or residents in its own territory. Unlike the paradigm offenses identified in *Sosa*, a foreign government's conduct in its own territory towards its own citizens and residents may implicate human rights precepts of modern international law, but it does not create an obligation for the United States to provide a remedy. To the contrary, the far greater risk of adverse foreign-affairs consequences to the United States arises from U.S. actions providing a forum that

presumes to pass judgment on Jordan's or another sovereign's actions or inaction towards its own citizens and residents outside the territory of the United States.

At the time of the ATS's enactment, it would have been well understood that the United States had no authority to interfere in the internal affairs of other nations. As Chief Justice John Jay wrote in *Henfield's Case*, "[i]t is to be remembered, that every nation is, and ought to be, perfectly and absolutely sovereign within its own dominions, to the entire exclusion of all foreign power, interference and jurisdiction." 11 F.Cas. 1099, 1103 (C.C.D. P. 1793) (No. 6,360).

To that end, "[i]t does not, then, belong to any foreign power to take cognisance of the administration of [another] sovereign, to set himself up for a judge of his conduct, and to oblige him to alter it." Vattel, bk. II, § 55, at 155. Accordingly, under the law of nations at the time the ATS was enacted, as then-Circuit Justice Story explained in his 1822 opinion in *United States v. The La Jeune Eugenie*, given the requirement of respecting the sovereignty of other nations, there could be no redress in this nation's courts for even obvious wrongs committed by another nation against its own citizens: "No nation has ever yet pretended to be the custos morum of the whole world; and though abstractedly a particular regulation may violate the law of nations, it may sometimes, in the case of nations, be a wrong without a remedy." 26 F. Cas. 832, 847-848 (C.C.D. Mass. 1822) (No. 15,551) (Story, J.).

Not only was non-interference with another nation's sovereign right to self-governance honored as a matter of practice, but a failure to respect the other

state's domain would itself have been viewed as a violation of the law of nations and, quite likely, a just cause for war or at least serious diplomatic consequences. *See* Vattel, bk. II, § 57, at 157 ("[A] sovereign has a right to treat those as enemies who attempt to interfere in his domestic affairs. . . .").

Accordingly, it would have been entirely clear in 1789 that the jurisdiction conferred by the ATS did not extend to claims arising from a foreign sovereign's action or inaction toward its own citizens or residents within its own territory.

Even today, when international law is understood to include certain limits on the power of governments over their own citizens and residents, allowing American courts to assert authority over such claims would "raise risks of adverse foreign policy consequences," *Sosa*, 542 U.S. at 728, while serving none of the purposes of the ATS.

II. CORPORATE LIABILITY FOR INTERNATIONAL WRONGS DOES NOT SATISFY *SOSA*'S REQUIREMENTS OF SPECIFICITY AND INTERNATIONAL CONSENSUS

Even if *arguendo* the ATS is read to authorize U.S. courts to create an implied cause of action for international law violations that is not premised on a breach by the United States of its obligations owed to another state, Petitioners' claim of corporate liability for international law violations fails *Sosa*'s requirement of "acceptance among civilized nations" comparable to the consensus acceptance of the "historical paradigms" discussed in that opinion. 542 U.S. at 732. No such consensus exists in international law with respect to corporate liability for international wrongs.

A. Corporate Liability is Subject to *Sosa*'s Requirement of an International Law Consensus.

Whether the ATS authorizes corporate liability in an appropriate case is, in the first instance, governed by international law. Even then, whether a cause can proceed is subject to other limiting principles this Court has recognized, including the limited authority of federal courts to create new causes of action in advance of legislation, and the need to minimize the "risks of adverse foreign policy consequences," *Sosa*, 542 U.S. at 741, through recognizing new grounds for challenging the regulatory oversight that foreign states exercise over corporations like Respondent that operate within their borders.

Petitioners' argument that a principle of corporate liability for modern international law violations may be borrowed from domestic law is contrary to *Sosa* and to the very language of the ATS. The text of the ATS requires that the defendant himself have violated international law, as it provides jurisdiction only over torts "committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. If international law does not establish (without resort to domestic law) that a defendant corporation is responsible for committing an international wrong, then no "tort [has been] committed in violation of the law of nations" under the ATS.

Sosa confirms this principle. The Court held that the ATS did not directly create a cause of action, 542 U.S. at 712-14, but that Congress in passing the ATS tacitly acknowledged federal courts' authority to recognize causes of action for "the modest number of

international law violations with a potential for personal liability at the time," *id.* at 724, and potentially for a limited class of other international law violations, *id.* at 725. Thus, because the jurisdiction conferred by the ATS is limited to "recogniz[ing]" established "claim[s] under the law of nations," *id.* at 725, an "international law violation[]," *id.* at 724, by the particular defendant is a necessary element in determining "the scope of conduct prohibited by the statutory text," *Central Bank N.A. v. First Interstate Bank*, 511 U.S. 165, 177 (1994) (aiding and abetting liability held to be outside "the scope of conduct" prohibited by Securities Exchange Act of 1934). Put differently, neither the ATS nor *Sosa* authorizes U.S. courts to create common law liability for conduct by a particular defendant that does *not* violate international law.

Petitioners would have the Court confine its inquiry to whether the "norm" in isolation is *Sosa*-compliant under international law. But "identifying . . . a norm [of international law] is only the beginning of defining a cause of action." *Kiobel*, 133 S.Ct. at 1665. Here, the norm does not stand alone; under the ATS, the violation by the particular defendant must be tied to international law. The ATS provides jurisdiction only over tortious conduct against aliens that violates the law of nations or U.S. treaties. In the context of torture, Petitioners concede that the norm against torture does not stand alone but can be violated only by state actors. *See* Petitioners' Br., No. 16-499, p. 29. The issue of corporate liability is simply another question of "*whether international law extends the scope of liability* for a violation of a given norm to the perpetrator being sued," *Sosa*, 542 U.S. at 732 n.20 (emphasis added)—no different in kind from the

question of whether "the defendant is a private actor such as a corporation or individual." *Id.* *See also id.* at 760 (Breyer, J. concurring) (under the Court's approach "to qualify for recognition under the ATS a norm of international law . . . must extend liability to the type of perpetrator (e.g., a private actor) the plaintiff seeks to sue").

In short, the liability of a particular defendant is not a mere ancillary question whose answer may be borrowed from domestic law. Liability under the ATS requires a showing that the particular defendant being sued has violated well-established international law. As this Court observed in *Kiobel*, defining the scope of an international law-based cause of action includes "specifying who may be liable." 133 S.Ct. at 1665.

B. There is No International Consensus that Private Corporations May Be Liable for Violations of Customary International Law.

Corporate liability for international wrongs is not a well-established principle of customary international law. Even if certain recent treaties might be read to include corporations as possible defendants, there has been no consistent practice or consensus of the world's nations, as required by *Sosa*. It is true that various international bodies have recently discussed the possibility, even the desirability, of an international code of conduct for business activities.[8] The premise

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[8] See Intl. Comm. of Jurists, *Access to Justice: Human Rights Abuses Involving Corporations* 3 n.7 (2010), *available at* http://www.icj.org/dwn/database/SouthAfrica-Access-to-Justice-2010.pdf (describing "controversy as to the existence of liability under international law").

of these discussions, however, is that no such law presently exists.

Petitioners emphasize that the ATS court is not limited to instances of corporate liability for violations of customary international law, but may also glean the requisite international consensus from "general principles of law recognized by civilized nations," Art. 38(1)(c) of the Statute of the International Court of Justice.[9] This is a source for international tribunals without a clear underpinning. It is a source "which comes after those depending more immediately on the consent of states and yet escapes classification as a 'subsidiary means' in paragraph (d). . . . In the conference of jurists which prepared the Statute there was no very definite consensus on the precise significance of the phrase." Ian Brownlie, *Principles of International Law* 15 (5th ed. 1998, reprinted 2001). We acknowledge that "general principles" built on domestic law precedents may be invoked in appropriate cases in international

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[9] Article 38 provides in relevant part.

> 1. The [International Court of Justice], whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations;
>
> d. ... judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

tribunals, but whether they can take the place of evidence of international practice that would satisfy the *Sosa* requirements of specificity and international consensus as a basis for imposing liability on particular defendants under the ATS is a different matter.

Petitioners are essentially asking this Court to anticipate the formation of international law in this area by seizing upon the ATS as authority for U.S. courts to develop their own international code of conduct for non-U.S. corporations. Such a course is radically inconsistent with the caution this Court urged in *Sosa*. The absence of an international consensus on the question of corporate liability for international wrongs is apparent even from a review of Petitioners' principal authorities. (Their other authorities are canvassed in subpart C below.)

For example, although the Nuremberg trials immediately after World War II spurred recognition of natural persons' liability for certain violations of international law, those trials did not impose liability on corporations, and no international consensus of widespread practice actuated by a sense of legal obligation—the two core elements of customary international law—has emerged regarding the liability of private corporations for international wrongs. Many corporations and other businesses aided the war crimes committed by Nazi Germany and its allies. In a few cases, where the companies functioned as *instrumentalities of the Nazi regime*, as was the case with I.G. Farben, these companies were dissolved and their assets taken over as an exercise of the authority international law allows occupation forces rather than as a means of punishment for violation of international law. However, with respect to any determination of liability under customary

international law, only individuals were brought to account.[10]

The Nuremberg adjudicative machinery was established by Article 6 of the Charter of the International Military Tribunal (Oct. 6, 1945), 81 U.N.T.S. 284 (1951), which provided that the Tribunal had the power "to try and punish persons who. . . , whether as individuals or members of organizations," committed certain crimes. *Id.* at 286 (Art. 6). Whether as unaffiliated individuals or as members of organizations, the accused were natural persons, not legal entities. Provision was made for declaring and proving that "the group or organization of which the individual was a member was a criminal organization." *Id.* at 290 (Art. 9). The effect, however, was not enterprise liability but to make membership in such an organization a punishable offense—a recognition of "the right to bring individuals to trial for membership [in the criminal organization]." *Id.* (Art. 10). Similarly, Control Council Law No. 10 speaks only of punishment of "persons," not entities; of "war criminals and other similar offenders, other than those dealt with by the International Military Tribunal"; and of "[t]he delivery . . . of persons for trial" (preamble, Arts. II & V).

Even where a commercial organization was plainly involved in the commission of war crimes, as in the

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[10] "[T]he major legal significance of the (Nuremberg) judgments lies ... in those portions of the judgments dealing with the *area of personal responsibility* for international law crimes." *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 244 n.18 (2d Cir. 2003) (quoting Telford Taylor, Chief of Counsel for War Crimes, *Final Report of the Secretary of the Army on the Nuremberg War Crimes Trials Under Council Law No. 10*, at 109 (Aug. 15, 1949; 1997 ed.)) (emphasis in original).

case of the business executives charged with supplying Zyklon B gas to Nazi concentration camps, the Nuremberg prosecutions were against the individual who owned the firm, his immediate deputy, and the senior technical expert for the firm; the firm itself was not the subject of the prosecution. *See In re Tesch and Others* (Zyklon B Case), excerpted in *Ann. Digest and Reports of Public International Law Cases, Year 1946* (H. Lauterpacht ed., 1951) (heading: "Subjects of the Law of War").

Petitioners' (and their *amici*'s) argument based upon the treatment of I.G. Farben (*see* Pet. Br., No. 16-499, p. 49) erroneously conflates the actions of the military occupation with the adjudication of criminal liability of customary international law violators by the International Military Tribunal. Control Council Law No. 9 makes clear that the Control Council was seizing all of the asserts of I.G. Farben as an exercise of occupation military authority: "In order to insure that Germany will never again threaten her neighbours or the peace of the world, and taking into consideration that I.G. Farben industrie knowingly and prominently engaged in building up and maintaining the German war potential, the Control Council enacts as follows: All plants, properties and assets of any nature situated in Germany which were, on or after 8 May, 1945, owned or controlled by I.G. Farbenindustrie . . . are hereby seized by and legal title thereto is vested in the Control Council." (Preamble & Article I). To like effect is Control Council Law No. 57 which provided for "Dissolution and Liquidation of Insurances [sic] Connected with the German Labour Front," a Nazi organization.

That Nuremberg did not extend liability to corporations is further reflected in the U.N.

International Law Commission's 1950 commentary on the Nuremburg Tribunal, which noted the distinction between individual and entity responsibility:

> 99. The general rule . . . is that international law may impose duties on individuals directly without any interposition of internal law. The findings of the [International Military] Tribunal were very definite on the question. . . . "That international law imposes duties and liabilities upon individuals, as well as upon States," said the judgment of the Tribunal, "has long been recognized." It added: "Crimes against international law are committed *by men, not by abstract entities*, and only by punishing individuals who commit such crimes can the provision of international law be enforced."

Vol. II, 1950 *Y.B. of the International Law Comm'n.* 374 (2005 repr.), quoting 1 *Trial of the Major War Criminals before the International Military Tribunal* 223 (1947) (emphasis added).

The existence of an international consensus on the responsibility of natural persons or states for certain violations of international law, and the absence of any similar consensus regarding the liability of private corporations continues to the present. Thus, the statutes of the ICTY and ICTR confer jurisdiction on these tribunals only to try individuals. *See* Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, Art. 7(1), U.N. S/RES/827 (May 25, 1993); Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, Art. 6(1), U.N. S/RES/955 (Nov. 8, 1994).

Similarly, Article 25(1) of the Rome Statute establishing the International Criminal Court ("ICC") confirms the principle of "[i]ndividual criminal responsibility" as the limit of the ICC's authority: "The Court shall have jurisdiction over natural persons pursuant to this Statute." The decision to limit the ICC's mandate reflected considerable disagreement among signatory states. We quote at length from a leading observer of the ICC negotiation process to convey the extent of non-consensus on this issue:

> As far as the jurisdiction over natural persons is concerned, paragraph 1 [of Article 25] states the obvious. Already the International Military Tribunal found that international crimes are "committed by men not by abstract entities." However, *the decision whether to include "legal" or "juridical" persons within the jurisdiction of the court was controversial.* The French delegation argued strongly in favour of inclusion since it considered it to be important in terms of restitution and compensation orders for victims. . . . Despite th[e] rather limited liability [of a subsequent draft], the proposal was rejected for several reasons which as a whole are quite convincing. The inclusion of collective liability would detract from the Court's jurisdictional focus, which is on individuals. Furthermore, the Court would be confronted with serious and ultimately overwhelming problems of evidence. In addition, *there are not yet universally recognized common standards for corporate liability; in fact, the concept is not*

> *even recognized in some major criminal law systems.*

Kai Ambos, Article 25, in *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* 477-78 (2d ed. 2008) (emphasis added).

In addition to the explanation tendered by Professor Ambos, other reasons have been offered for the absence of the requisite international consensus behind corporate liability for international wrongs. One significant factor is that multinational corporations enjoy different degrees of governmental support for their operations. Some corporations may be no more than extensions of their foreign state sponsors, raising the prospect of inconsistent regulation, or at least significant tensions, between states that are principally funders and states where corporations conduct business activities. "[It will not always be easy to distinguish corporations which are so closely controlled by governments as to be state agencies, with or without some degree of autonomy, and private corporations not sharing the international law capacity of a state." Brownlie, Principles, *supra,* at 6. Moreover, recognition of corporate personhood as an international matter may also give rise to unruly claims of corporate autonomy from all state regulation. *See id.* at 66-67.

Given the continuous tradition from the post-war period to the present of limiting the responsibility of non-state actors for customary international law offenses to natural individuals, the range of views attending the abortive inclusion of a limited form of corporate liability in the Rome Statute, the absence of "universally recognized common standards for

corporate liability," and the absence of the very concept in "some major criminal law systems," the liability of corporate defendants cannot be considered a universally supported rule of sufficient specificity and consensus to satisfy the requirements of *Sosa*. Furthermore, the dearth of international law precedents guiding when a corporate entity should be deemed liable for the acts of its agents or other actors provides an additional reason for not recognizing an implied cause of action under the ATS in this case. The process of implementing corporate liability under the ATS would inevitably require selective borrowings from U.S. domestic law to adjudicate what are ostensibly violations of international law.

The absence of settled international law on corporate liability for international wrongs is reflected in the debates during the drafting of the Rome Statute over whether to impose and how to implement rules of private corporate liability for international crimes. One widely-discussed draft of the Rome Statute included jurisdiction over juridical entities, including private corporations. But it conditioned such liability on a simultaneous criminal conviction of a natural person "who was in a position of control" of the juridical entity and was acting on behalf of and with the explicit consent of the juridical person. *See* Andrew Clapham, *The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons Learned from the Rome Conference on an International Criminal Court*, in Liability of Multinational Corporations Under International Law 150-51 (M.T. Kamminga and S. Zia-Zarifi, eds., Kluwer Law International, 2000) (discussing Working Paper on Article 23, Paragraphs 5 and 6 of

the Rome Statute). These requirements are far more onerous than U.S. domestic practice with respect to corporate criminal liability, but in the end, even this restrictive text was dropped by the Rome Statute negotiators due to an inability to satisfy all delegations' "queries about this innovative use of international criminal law." *Id.* at 157.

Courts considering ATS claims against private corporations have encountered a similar problem when considering plaintiffs' claims against the subsidiaries of certain defendants. In the *South Africa Apartheid Litigation*, for instance, plaintiffs sought to hold the parent companies liable on a theory of alter ego and agency. *See In re S. Africa Apartheid Litig.*, 617 F. Supp. 2d 228, 270 (S.D.N.Y. 2009). As the court in that case openly acknowledged, the utter lack of international standards for "piercing the corporate veil" required the court to rely instead on federal common law; "the international law of agency has not developed precise standards to apply in the civil context." *Id.* at 271.

But the lack of "precise standards" under international law is exactly the type of situation that warrants dismissal of Petitioners' attempt to extend ATS to corporate conduct. As discussed above, a cause of action under the ATS requires that the defendant's conduct amount to a violation under settled principles of *international* law. Resort to federal common law to determine the substantive scope of liability runs contrary to the ATS and to *Sosa*. The very necessity of such "gap filling" throws in sharp relief the innumerable practical obstacles of applying an "international law of agency" and an "international law of accessorial liability" to an "international law of corporate liability" when no

such law exists in the agreed upon, binding practice of nations.[11]

C. Examples of Corporate Liability For International Wrongs Offered By Petitioners and Their *Amici* Do Not Establish the Uniform Consensus Required by *Sosa*.

It is not our position that international law bars corporate liability in appropriate cases or that there have never been instances of corporate liability for international wrongs, but rather that such instances, and other evidence marshalled by Petitioners and their *amici*, does not reflect the uniform acceptance among civilized states required by *Sosa*.

1. Corporate Liability Under U.S. Law

As a general matter, once chartered, corporations could sue and be sued in the United States, but whether they could be sued *in tort* was an open question at least until the 1820s:

> Early in the nineteenth century, it was clear enough that a corporation could be burdened with civil liability when it failed to perform a specific duty imposed by law—for example, the duty of common carriers. But these nonperformance cases apart, in the early nineteenth century there was real doubt as to whether corporations were generally vulnerable to liability in tort.

Gary T. Schwartz. *The Character of Early American Tort Law*, 36 U.C.L.A. L. Rev. 641, 648 (1989).

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[11] *See* Julian G. Ku, *The Curious Case of Corporate Liability Under the Alien Tort Statute*, 51 Va. J. Int'l L. 353, 392-93 (2010).

One explanation for this early corporate immunity from tort was a technical one—the requisite writs of *capias* and *exigent* did not lie against a corporation. A second explanation was that "trespass presupposes 'a personal act of which the corporation is incapable in its collective capacity.'" *Id.* at 649, quoting 1 S. Kyd, *A Treatise on the Law of Corporations* 223 (1793). Hence, employers were generally free of liability for torts committed by employees because the suit brought directly against the tortious employee "'will answer the purpose of bringing the (victim's) right to a judicial determination.'" *Id.* (citations omitted).

Whatever the reason, the limits on corporate liability in tort in early U.S. law are relevant for at least two reasons. First, the ATS expressly authorizes alien suits "for a tort only"; hence, actions involving commercial disputes would be outside its purview. See *Moxon v. The Fanny*, 17 F. Cas. 942 (D. Pa. 1793). Second, given this history, corporate tort liability was "probably [not] on the minds of the men who drafted the ATS." *Sosa*, 542 U.S. at 715.

Of course, our views towards corporate liability as a matter of U.S. domestic law have changed considerably, but whether a particular federal law encompasses corporate liability is often an issue requiring litigation. *See, e.g., Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 71 (2001) (private corporations providing halfway house under contract with the federal Bureau of Prisons held not subject to implied cause of action for constitutional violations under the Fourth Amendment because corporate liability would shift the focus away from "the individuals directly responsible for the alleged injury."). Similarly, when Congress expressly provided a cause of action for human rights violations

in the Torture Victim Protection Act of 1991, 106 Stat. 73, note following 28 U.S.C. § 1350, it declined to provide for any form of corporate or organizational liability. *See Mohamad v. Palestinian Authority*, 566 U.S. 449 (2012).

2. Suits Against the British East India Company

Petitioners' and their *amici*'s reference to decisions involving the British East India Company do not offer a clear precedent for holding modern private corporations liable for violations of international law. The British Company reflected aspects of both a private company and a sovereign. It had the rights of private persons such as the capacity to sue and be sued and be accountable for its debts, but it also exercised monopoly power and sovereign authority over extensive territory. Thus, "by the law and municipal constitution of this country the Company having a right to make war for the defence and melioration of their trade, are advised, that they being armed by the charters and municipal authority of this country with that power, stand[s] in all respects relating to the exercise of it in the same condition as if sovereigns." *Nabob of the Carnatic v. East India Company*, (1791) 30 Eng. Rep. 391, 401 (H.L.).

Given the Company's dual character—private company and sovereign—the decisions involving the Company stand on a similar footing to evolving decisional law in England and the United States gradually lifting official immunities to allow governments to be sued for certain conduct, usually by means of suit against the government agents

personally,[12] while shielding other conduct from liability. They provide scant guidance as to whether Congress in the ATS authorized suits against private corporations for violations of customary international law.

3. "Pirates, Inc." and In Rem Suits in Admiralty

There is considerable emphasis in the briefs of Petitioners and their *amici* on the theme that if piracy was indeed a "paradigm" offense in enacting the ATS, it is highly unlikely that Congress would have intended to exclude a corporation funding piratical conduct from ATS's reach. But as this Court's decision in *Malesko* indicates and the Nuremberg precedent illustrates, if the focus of the law is on establishing personal responsibility for the wrongdoing of individuals, the introduction of corporate or other enterprise liability may be thought to dilute the condemnatory effect of the law.

In any event, piracy differed from the other paradigm offenses in that the proceedings were in rem:

> [T]he condemnation of the vessel . . . operated as a fine against the principals, those who

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[12] See generally Louis L. Jaffe, *Judicial Control of Administrative Action*, ch. 4 (1965). In this regard, we note one of the cases cited by *amici*, *Rafael v. Verelst*, (1775) 96 Eng. Rep. 579, 579 (K.B.). In this case—decided fourteen years *before* the ATS was enacted—the plaintiffs sued Verelst, the Company's governor in Bombay, for acts allegedly taken by the Company. While the court found for the plaintiffs, it held the Governor *personally liable* for the acts of the East India Company. In another case relied on by *amici*, *The Case of the Jurisdiction of the House of Peers, between Thomas Skinner, Merchant, and the East-India Company* (1666), 6 State Trials 710 (H.L.), the judgment of the House of Lords for Skinner was overturned by the House of Commons on jurisdictional grounds and vacated by King Charles II. *Id.* at 727-28.

> had directly violated international law. Modern corporate liability, by contrast, seeks to impose costs on diffuse absentee shareholders, who do not exercise direct control over the international law violations of their corporate agents.

Eugene Kontorovich, *A Tort Statute, With Aliens and Pirates*, 107 Nw. Univ. L. Rev. Colloq. 100, 107 (2012).

In *Malek Adhel v. United States*, 43 U.S. 210 (1844), Justice Story for the Court dealt with a case where the master's vessel engaged in opportunistic acts of piracy, without the knowledge or authorization of the ship's owner. The Court held that the innocence of the owner provided no defense to the condemnation, but that the cargo itself was not subject to condemnation. The liability rule in *Malek Adhel* is a function of the in rem nature of the proceeding, not (as Petitioners and their *amici* suggest) grounded in modern tort principles of enterprise liability and full compensation. Thus, the cargo owners did not lose their cargo even though they in all likelihood hired the master who ultimately hired the crew. Moreover, far from guaranteeing full compensation to all victims, recovery was capped at the value of the condemned ship minus salvage. See Kontorovich, *supra*, at 112.

If, as we submit, the question of corporate liability under the ATS, *vel non*, is, in the first instance, governed by international law, there was no international law consensus in 1789 and there is none today that private corporations are suable qua corporations for violations of customary international law. That is the conclusion of the Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the

Netherlands as Amici Curiae in *Kiobel*, No. 10-1491, p. 9 ("The Governments consider that customary international law simply does not support a finding by this Court that corporations would be liable *as a matter of international law* when they engage in conduct that would be a violation of customary international law if done by a state.") (emphasis in original). Petitioners and their *amici*, of necessity, must repair to a motley collection of U.S. domestic law decisions of the mid- 19th Century, in rem precedents of the admiralty courts despite their limitations as examples of true enterprise liability, and "general principles" of international law gleaned from recent treaties that can be read to include corporations as defendants and the *action civiles* of some continental countries that permit civil suit after a successful criminal prosecution. This is a far cry from the firm evidence of international consensus required of the "vigilant gatekeepers" that *Sosa* envisions.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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